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In the Supreme Court of the United States

OCTOBER TERM, 1931.

No. 357

THE PACKER CORPORATION,
Appellant,

vs.

THE STATE OF UTAH.

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH.

BRIEF OF APPELLANT.

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Cleveland, Ohio,
December 19, 1931.

THE GAYNE LEGAL PUBLISHING CO., CLEVELAND, O.

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BRIEF OF APPELLANT.

The opinion of the Supreme Court of the State of Utah appears in the Record (pp. 3-7), and is reported in .... Utah ...., 2 P. (2d) 114 (1931).

This is an appeal under Judicial Code Section 237 from the judgment of the Supreme Court of the State of Utah affirming the conviction of appellant in the District Court of Salt Lake County, Utah, under Section 2, Chapter 145, Laws of Utah 1921*, as amended by Chapter 52, Laws of Utah 1923, as amended by Chapter 92, Laws of Utah 1929, which Section is hereinafter referred to as "Section 2" and reads as follows:

> "Sec. 2. *Unlawful to display advertising—where.* It shall be a misdemeanor for any person, company, or corporation, to display on any bill board, street car

*Complete text of statute appears in Appendix A (*infra* pp. 21 to 26).

sign, street car, placard, or on any other object or place of display, any advertisement of cigarettes, cigarette papers, cigars, chewing tobacco, or smoking tobacco, or any disguise or substitute of either, except that a dealer in cigarettes, cigarette papers, tobacco, or cigars or their substitutes, may have a sign on the front of his place of business stating that he is a dealer in such articles, provided that nothing herein shall be construed to prohibit the advertising of cigarettes, cigarette papers, chewing tobacco, smoking tobacco, or any disguise or substitute of either in any newspaper, magazine or periodical printed or circulating in the State of Utah."

STATEMENT OF FACTS.

Appellant, The Packer Corporation, is a corporation organized and existing under the laws of the State of Delaware and authorized to do business in the State of Utah, with its principal office in Cleveland, Ohio. (R., 24.) It is the owner of certain billboards in the State of Utah, upon which it displays posters advertising various products. (R., 25.)

Under the terms of a contract entered into at Cleveland, Ohio, (R., 24) between appellant and the advertising agency of Foster & Kleiser, of San Francisco, California, appellant, on April 22, 1931, displayed posters upon a certain billboard owned and operated by it in Salt Lake City, Utah (R., 20) which posters contained an illustration of a horse and rider, a representation of a package of Chesterfield cigarettes, and the words "Good Taste Takes the Lead." (R., 19.) Said posters were prepared and shipped by The Liggett & Meyers Tobacco Company from the State of California to appellant in the State of Utah for display by appellant upon said billboard (R., 23), in accordance with the terms of said contract.

For such display appellant was arrested and charged with violation of said Section 2, and was convicted in the

Justices' Court of the City of Salt Lake, and again convicted on appeal to the District Court of Salt Lake County and sentenced to pay a fine of One Hundred Dollars.

At the trial of appellant in the District Court of Salt Lake County it demurred to the complaint upon the ground that Section 2 violated the Constitution of the United States in that among other things:

A. It violated the provisions of Article I, Section 10, by impairing the obligations of contracts.

B. It violated the provisions of Article I, Section 8, by unduly restraining interstate commerce.

C. It violated the provisions of the Fourteenth Amendment by depriving the appellant of property without due process of law, and denying the appellant the equal protection of the laws. (R., 12-13.)

Said demurrer was overruled and exception taken thereto, and upon trial appellant again urged by motion the grounds of the unconstitutionality of said Section 2 as hereinabove set forth. (R., 14.) Said motion was denied and exception thereto taken, and the appellant was convicted.

From such conviction appeal was taken to the Supreme Court of the State of Utah, in which court appellant again raised the unconstitutionality of Section 2 under the Constitution of the United States.

The Supreme Court of Utah affirmed the conviction in the District Court, with two Justices dissenting. In this decision the Supreme Court of Utah was controlled by the case of *State vs. The Packer Corporation*, ... Utah .., 297 Pac. 1013 (1931), which opinion on a similar state of facts sets forth the reasons controlling the Supreme Court of the State of Utah in the instant case.

SPECIFICATIONS OF ERROR.

The ultimate error assigned by the appellant is that the Supreme Court of Utah erred in holding as a matter of law that Section 2, as applied to this appellant, did not violate the Constitution of the United States. Whether or not the Supreme Court of Utah did so err is the sole issue in this case.

Detailed specifications of error are set forth in the assignments of error (R., 30-32), of which appellant urges in this Court only the following:

A. The Supreme Court of Utah erred in holding as a matter of law that Section 2 did not violate the Fourteenth Amendment to the Constitution of the United States, and

B. The Supreme Court of Utah erred in holding as a matter of law that Section 2 did not violate Article I, Section 8 of the Constitution of the United States.

SUMMARY OF ARGUMENT.

Summarizing, appellant respectfully urges that Section 2 of the Utah Statute aforesaid violates the Constitution of the United States in the following respects:

A. Section 2 constitutes an improper exercise of police power, and therefore violates the Fourteenth Amendment to the Constitution of the United States—

1. By unreasonably discriminating between the display by appellant of tobacco advertisements upon billboards and the display of such advertisements by others similarly situated, in newspapers, magazines or periodicals, thus denying to the appellant the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

2. By depriving appellant without due process of law of its property in a contract duly entered into by

appellant, through the enactment of such an arbitrary and unreasonable statute as Section 2, in violation of the Fourteenth Amendment to the Constitution of the United States.

B. Section 2 places an unreasonable restraint upon commerce among the several States, in violation of Article I, Section 8 of the Constitution of the United States.

ARGUMENT.

I. SECTION 2 OF THE UTAH STATUTE UNDER WHICH THE APPELLANT WAS CONVICTED VIOLATES THE CONSTITUTION OF THE UNITED STATES.

A. Section 2 of the Utah Statute constitutes an improper exercise of the police power of the State of Utah and therefore violates the Fourteenth Amendment to the Constitution of the United States.

History of Utah Statute. In 1921 the Utah Legislature passed an Act making it unlawful to sell or advertise cigarettes or cigarette papers in the State, for proprietors to permit minors to frequent their places of business while using tobacco, and forbidding any person to smoke in certain enclosed public places. This Act met with such public disapproval that the next Legislature, Laws of Utah, 1923, Chapter 52, repealed it. The 1923 Act required the obtaining of a permit and paying of an annual license to sell cigarettes and imposed a tax upon cigarettes.

Thus, upon obtaining a permit and paying the annual license fee and the tax the sale of cigarettes and cigarette papers was made lawful, and the business in these articles can ... ore now be carried on as any other lawful business.

The 1923 Act provided against the sale of tobacco to minors, thus reinstating a law which had been in force in

Utah for many years. The 1923 Act further provided against minors smoking in the establishments of tobacco dealers, thus re-enacting a part of the 1921 Act. However, in all other places a minor was and is at liberty to chew and smoke tobacco in all its forms without restrictions and under the same conditions that an adult is permitted to use tobacco.

Section 2 of the 1923 Act prohibiting all advertising of cigarettes was considered by the Utah Supreme Court in *State vs. Salt Lake Tribune Publishing Company,* 68 Utah 187, 249 Pac. 474, (1926) and so far as it applied to the printing of cigarette advertisements in newspapers circulating in interstate commerce was held unconstitutional as violating Article I, Section 8 of the Constitution of the United States. The Court, however, found it unnecessary to express an opinion as to the validity of the Act in other respects.

Thereafter the Legislature, Laws of Utah, 1929, Chapter 92, amended Section 2 of the Laws of 1923 to make it applicable to the advertising of all forms of tobacco but in order to avoid the effect of the *Salt Lake Publishing case, supra,* provided that the Section should not apply to tobacco advertisements appearing in periodicals. The appellant respectfully submits that in its struggle to avoid the effects of the *Salt Lake Tribune Publishing Company case* the State of Utah enacted legislation which is repugnant to the Constitution of the United States.

1. To make illegal the display of tobacco advertisements by the appellant upon billboards and to exempt the display of tobacco advertisements in periodicals by others similarly situated is to deny the appellant the equal protection of the laws, in violation of the Fourteenth Amendment to the Constitution of the United States.

It is clear from the provisions of Section 2 that the advertising of tobacco on billboards, placards or other places

of display constitutes a misdemeanor, while the advertising of tobacco in newspapers or other periodicals is not forbidden. Certainly this is a discrimination in favor of one class of advertising against another class. Moreover, it is a discrimination which upon its face is of an unusual character. This Court, speaking through Mr. Justice Sutherland, in *Louisville Gas Company vs. Coleman*, 277 U. S. 32, 37 (1928) said:

> "Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."

If the discrimination of Section 2 is not obnoxious to the Constitution, it must be justified upon the ground that it was made in the exercise of police power in order to protect the public morals, the public health and/or the public safety. In *Connolly vs. Union Sewer Pipe Company*, 184 U. S. 540, 558 (1902), this Court said:

> "* * * The State has undoubtedly the power, by appropriate legislation, to protect the public morals, the public health and the public safety, but if, by their necessary operation, its regulations looking to either of those ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void."

Again this Court, speaking through Mr. Justice Van Devanter, in *Power Manufacturing Company vs. Saunders*, 274 U. S. 490, 493 (1927) has said:

> "The clause in the Fourteenth Amendment forbidding a State to deny to any person within its jurisdiction the equal protection of the laws is a pledge of the protection of equal laws, [citing cases] and extends as well to corporate as to natural persons, [citing cases]. It does not prevent a State from adjusting its legislation to differences in situation or forbid classification in that connection; but it does require

that the classification be not arbitrary but based on a real and substantial difference having a reasonable relation to the subject of the particular legislation."

This Court has recently decided a case directly in point; *Smith vs. Cahoon*, 283 U. S. 553 (1931). Appellant in that case, a private carrier for hire, was arrested in Florida for driving upon the highways of the State without having obtained a certificate of public convenience and necessity and without having paid a tax required by the statute of Florida, which provided for the regulation of "automobile transportation companies." The statute in defining an "automobile transportation company" excepted, among others, corporations or persons exclusively engaged in transporting farm products from the point of production to the assembly or shipping-point en route to a primary market. At the preliminary hearing the appellant challenged the validity of the statute as applied to him, on the ground that it was repugnant to the due process and equal protection clauses of the Fourteenth Amendment of the Constitution of the United States. The appellant was held for trial, but upon a return to a writ of *habeas corpus* the Circuit Court of the county decided that the statute as applied to the appellant was unconstitutional. This judgment was reversed by the Supreme Court of Florida, which upheld the statute. The case then came to this Court on appeal, where the judgment was reversed. A unanimous Court, speaking through the Chief Justice, said at page 566:

"The principle that the State has a broad discretion in classification in the exercise of its power of regulation is constantly recognized by the decisions of this Court. [Citing cases] But the constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely arbitrary. In determining what is within the range of discretion and what is arbitrary, regard must be had to the particu-

lar subject of the State's action. In the present instance, the regulation as to the giving of a bond or insurance policy to protect the public generally, in order to be sustained, must be deemed to relate to the public safety. This is a matter of grave concern as the highways become increasingly crowded with motor vehicles, and we entertain no doubt of the power of the State to insist upon suitable protection for the public against injuries through the operations on its highways of carriers for hire, whether they are common carriers or private carriers. *But in establishing such a regulation, there does not appear to be the slightest justification for making a distinction between those who carry for hire farm products, or milk or butter, or fish or oysters, and those who carry for hire bread or sugar, or tea or coffee, or groceries in general, or other useful commodities.* So far as the statute was designed to safeguard the public with respect to the use of the highways, we think that the discrimination it makes between the private carriers which are relieved of the necessity of obtaining certificates and giving security, and a carrier such as the appellant, was wholly arbitrary and constituted a violation of the appellant's constitutional right. 'Such a classification is not based on anything having relation to the purpose for which it is made.' *Air-way Corp. v. Day,* 266 U. S. 71, 85 [citing cases]." (Italics ours.)

If, as was held in the *Cahoon case, supra,* there is no justification for making a distinction between the hauling of farm products and the hauling of groceries, then there can be no justification for making a distinction between the advertising of tobacco by displays upon billboards and the advertising of tobacco by displays in periodicals. There is even less justification for distinguishing, as does Section 2, between display advertising by tobacco dealers on the fronts of their places of business and display advertising by non-dealers everywhere. Under the doctrine of the *Cahoon case, supra,* Section 2 is clearly discrimina-

tory and the classification there made "is not based on anything having relation to the purpose for which it is made." *Air-Way Corporation vs. Day*, 266 U. S. 71, 85 (1924).

As this Court has said in *Connolly vs. Union Sewer Pipe Company*, 184 U. S. 540, 563 (1902):

> "In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. It is quite a different thing for the State, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with domestic trade or commerce. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates."

The State of Utah, in Section 2 of the statute in question, has done what this Court in the *Connolly case* said could not be done without violating rights secured by the constitution of the United States. It has entered the domain of advertising and discriminated against those engaged in display advertising by exempting those engaged in periodical advertising from the regulation of the statute. The statute in effect declares that the display of an advertisement of smoking materials upon a billboard is criminal, while the display of *the same advertisement* in a magazine is not criminal.

A state, in the exercise of its police power, can undoubtedly classify the subjects of regulation; but such classification must be based upon some reasonable ground —some difference which bears a just and proper relation to the attempted classification—and not a mere arbitrary selection. *Truax vs. Corrigan,* 257 U. S. 312, 332 (1921); *Hayes vs. Missouri,* 120 U. S. 68, 71 (1887); *Gulf, Colorado & Santa Fe Railway Company vs. Ellis,* 165 U. S. 150, 155 (1897); *Cotting vs. Kansas City Stock Yards Company,* 183 U. S. 79, 111 (1901).

Or in the words of Mr. Justice Straup, dissenting in the earlier Utah case construing Section 2 (297 Pac. 1013, 1022):

> "We thus are brought back to the proposition, and to the real question in hand, as to whether it was competent for the Legislature in the exercise of the police power, to curtail or prevent advertisements of a commodity of a lawful business, especially to forbid advertisements by a particular method not itself obnoxious or inimical to public morals or general welfare, and at the same time permit *ad libitum* all sorts of alluring and attractive advertisements of the same article or commodity by various other methods."

No justifiable basis for classification here exists. The sale of tobacco is not illegal in Utah, nor is it considered inimical to the public health or morals. There is nothing detrimental to public health or morals in billboard advertising, because every product except tobacco may be legally advertised upon billboards. Yet the Utah Legislature has singled out the billboard advertising of tobacco and attempted to make it illegal. It is to protect the citizens of the States from such capricious acts on the part of the State law-making bodies that the Fourteenth Amendment was added to the Constitution of the United States.

In a vain effort to find some reasonable basis upon which to support the discrimination against billboard ad-

vertising the Utah Supreme Court in the majority opinion of the earlier case sought to read into the Statute an intent to keep temptation from minors by striking at "a most effective and insidious method of inducement habitually used to lure the youth into the use of these products by prohibiting the advertising of cigarettes and tobacco on billboards, placards, and in street cars," (297 Pac. 1013, 1018). Even though this language is forceful, it is not convincing and fails to indicate any reasonable basis why one "insidious method of inducement" should be prohibited and the other methods with like effects and results allowed to flourish. If closely analyzed the language of the majority opinion in that case (297 Pac. 1013) simply states a conclusion—that "Billboards, street car signs, and placards and such are in a class by themselves" (297 Pac. 1013, 1019)—without suggesting reasons to support this conclusion.

The classification of Section 2 bears no reasonable relation to the protection of public health and/or public morals for which purposes it must be deemed the statute was enacted. Even assuming *arguendo* that the advertising of tobacco is inimical, there is no harmful element in display advertising which is not also inherent in periodical advertising. There is no real difference between display and periodical advertising. Very frequently exactly the same illustrations and wording are used in both. Each class of advertising is equally subject to examination by minors and adults. Display advertising is simply one of the many mediums of which radio, hand-bills, and direct mail are others. If there is any distinction between one class of advertising and another from the standpoint of protecting public health or morals, it must be on the basis that one form makes a deeper impression upon the public than others. That there is no such distinction in the effectiveness so far as making an impression upon the public is concerned is evidenced by the fact that national adver-

tisers usually use all forms. There is, therefore, no reasonable distinction between the two classes of advertising and to legislate against the form used by the appellant without legislating against the forms used by others similarly situated denies to the appellant equal protection of the laws.

The appellant will not burden this Court with a further citation from the many cases which establish the doctrine that in the exercise of its police power a State can make only a reasonable classification without violating the Fourteenth Amendment to the Constitution of the United States.

The appellant will conclude its application of this doctrine to Section 2 by respectfully referring this Court to the dissenting opinion of Mr. Justice Straup, of the Utah Supreme Court, in the case upon which the Utah Supreme Court relied entirely in deciding this case, 297 Pac. 1013, 1020. In this dissenting opinion there appears a very clear statement of the manner in which Section 2 is discriminatory. The concluding paragraph of this dissenting opinion, found at 297 Pac. page 1029, is as follows:

> "Thus, since tobacco has not been outlawed, and to engage in buying and selling it is a lawful business, and since advertisement thereof is a necessary incident thereto, an act, preventing advertisement of tobacco by a particular and lawful method or medium, not itself obnoxious or harmful, while permitting advertisements of all other articles of merchandise by the same method, and permitting tobacco in all its forms to be advertised by all other methods, except by billboards, etc., is an unreasonable and arbitrary exercise of the police power, creates an unwarranted discrimination, abridges the right to contract concerning a lawful business and the right to acquire, possess, and enjoy property, in effect amounts to a deprivation of property without due process of law, and is a denial of the equal protection of the law and of privileges and immunities of citizens safeguarded and protected by constitutional provisions."

2. To make it illegal for the appellant to carry out the contract under which the advertisement in question was displayed, by a statute so unreasonable and arbitrary as Section 2, is to deprive the appellant of property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States.

The appellant had a contract under the terms of which it posted the particular advertisement for the displaying of which it was convicted under Section 2. Under the terms of this contract the appellant was to display other similar advertisements in the State of Utah at other times and places, for which it was to receive payments. The right of the appellant to make such a contract was a property right.

This Court has repeatedly held that freedom in the making of contracts is a property right. For example, in *Prudential Insurance Company vs. Cheek,* 259 U. S. 530 (1922), it was said at page 536:

> "That freedom in the making of contracts of personal employment, by which labor and other services are exchanged for money or other forms of property, is an elementary part of the rights of personal liberty and private property, not to be struck down directly or arbitrarily interfered with, consistently with the due process of law guaranteed by the Fourteenth Amendment, we are not disposed to question. This court has affirmed the principle in recent cases. *Adair v. United States,* 208 U. S. 161, 174; *Coppage v. Kansas,* 236 U. S. 1, 14."

While the freedom of the appellant to make contracts may be abridged by the State under the exercise of its police power, that restraint must be exercised in protecting some public interest, and the restraints upon the appellant's freedom of contract must be reasonable and cannot be arbitrary without being obnoxious to the Constitu-

tion of the United States. Speaking with respect to an act of the State of Kansas, this Court, in *Wolff Company vs. Industrial Relations Court of Kansas,* 262 U. S. 522 (1923), said at page 534:

> "These qualifications do not change the essence of the act. It curtails the right of the employer on the one hand, and of the employee on the other, to contract about his affairs. This is part of the liberty of the individual protected by the guaranty of the due process clause of the Fourteenth Amendment. *Meyer v. Nebraska, ante,* 390. While there is no such thing as absolute freedom of contract and it is subject to a variety of restraints, they must not be arbitrary or unreasonable. Freedom is the general rule, and restraint the exception. The legislative authority to abridge can be justified only by exceptional circumstances. *Adkins v. Children's Hospital,* 261 U. S. 525."

Thus, while the appellant's freedom of contract may be restrained by the State of Utah in the exercise of its police power, such a restraint must have a reasonable relation to the purpose for which the statute was enacted, and the restraint must not be arbitrary. As this Court, speaking through Mr. Justice McReynolds, said in *Liberty Warehouse Company vs. Burley Tobacco Association,* 276 U. S. 71, 97 (1928):

> "The liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint—not immunity from reasonable regulation to safeguard the public interest. The question is whether the restrictions of the statute have reasonable relation to a proper purpose. *Miller v. Wilson,* 236 U. S. 373, 380."

See also *Fairmount Creamery Co. vs. Minnesota,* 274 U. S. 1 (1927), where this Court held unconstitutional as violating the due process clause of the Fourteenth Amendment a Minnesota statute punishing anyone engaged in the business of buying dairy products, who discriminated be-

tween the different localities of the State by buying such commodities in one locality at a higher price than in another locality, allowance being made for difference in cost of transportation; and *Liggett Co. vs. Baldridge*, 278 U. S. 105 (1928), where this Court held unconstitutional a statute forbidding corporations from owning drug stores in addition to those owned at the time of the enactment unless all of the stockholders were licensed pharmacists, on the ground that it violated the due process clause of the Fourteenth Amendment, because mere stock ownership in a corporation owning a drug store could have no substantial relation to public health.

Under the doctrine of these cases Section 2 of the Utah statute in question violates the due process clause of the Fourteenth Amendment to the Constitution of the United States unless it is a restraint upon the appellant's right to freedom of contract which bears a reasonable relation to the purpose for which the Statute was enacted. It must be deemed that Section 2 was enacted for the purpose of protecting the health and/or morals of the people of the State of Utah. If the purpose of the statute is to protect the health and/or morals of the children of Utah by reducing their desire to purchase tobacco, it seems entirely unreasonable to prohibit billboard advertising of tobacco to everyone simply because some children may see the advertising and be made to desire the use of tobacco. Certainly by direct action against those who sell tobacco to minors the law may be enforced, and it is unreasonable to prohibit all display advertising simply because it may have some slight effect upon the number of children who ask tobacco dealers to violate the law by selling them tobacco.

Section 2 is both arbitrary and unreasonable in the way it deprives appellant of its property and is, therefore, obnoxious to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

B. Section 2 of the Utah Statute places an unreasonable restraint upon commerce among the several States and therefore violates Article I, Section 8 of the Constitution of the United States.

The Record (R. 23) indicates that the advertisements for the display of which appellant was convicted were shipped from the State of California into the State of Utah and then placed by the appellant upon its billboards. The advertisements which were sent into the State of Utah from a foreign state for the purpose of being posted upon the billboards in the State of Utah were articles in interstate commerce, and Section 2 prohibiting the display of these advertisements was an undue restraint of commerce among the several States and therefore violated Article I, Section 8 of the Constitution of the United States.

The case of *Ramsay Company vs. Bill Posters Association,* 260 U. S. 501 (1923), is a case in point. That case involved actions for damages under the Sherman Act. The trial court dismissed the complaints upon demurrer and the Circuit Court of Appeals affirmed this action. This Court reversed the Circuit Court of Appeals. The plaintiffs were solicitors of advertising. They prepared, purchased and sold posters and caused them to be displayed by local operators in many cities throughout the United States. They contracted with their customers and received pay for the entire service of preparing, designing, purchasing and posting the advertisements. It was claimed that many bill posters throughout the United States combined to monopolize the business and control the commerce in posters within fixed limits. In order for this Court to hold that the defendants violated the Sherman Act it became necessary to decide whether the business of the solicitors sending advertisements to their customers to be posted on billboards in various sections of the country con-

stituted interstate commerce. This Court, speaking through Mr. Justice McReynolds, said at page 511:

> "The court below held: 'The business of the solicitors is to send their customers' advertisements to be posted on billboards in various towns and cities throughout the country. Assuming that this business is, as between them and their customers, interstate commerce, we are clear that, after the posters have arrived at destination, *the posting of them by the bill poster is a purely local service, not directly affecting, but merely incidental to, interstate commerce.* We think this follows from the decision of the Supreme Court in *Hopkins v. United States*, 171 U. S. 578.'
>
> *We cannot accept this view.* The alleged combination is nation-wide; members of the Association are bound by agreement to pursue a certain course of business, designed and probably adequate materially to interfere with the free flow of commerce among the States and with Canada. As a direct result of the defendants' joint acts plaintiffs' interstate and foreign business has been greatly limited or destroyed. *Hopkins v. United States* is not applicable." (Italics ours)

Thus, in the *Ramsey case* this Court held that the sending from one state to another of advertisements to be displayed upon billboards was interstate commerce. Section 2 prohibits the display of these advertisements which are articles of interstate commerce, and therefore constitutes an unreasonable restraint upon interstate commerce and is obnoxious to the Constitution of the United States.

The party contracting with the appellant for the display of the advertisements to be shipped in interstate commerce intended that the particular advertisement should be shipped to the appellant and did not contemplate that the movement of the advertisement should cease until it was displayed upon the appellant's billboards throughout the State of Utah. The interstate character of the ship-

ment, therefore, continued until the advertisement had been displayed upon the billboards as contemplated by the parties. That this interstate character continued until that point is shown by the language of this Court, speaking through Mr. Justice Sutherland, in *Binderup vs. Pathe Exchange*, 263 U. S. 291, 309 (1923), where it was said:

> "Does the circumstance that in the course of the process the commodity is consigned to a local agency of the distributors, to be by that agency held until delivery to the lessee in the same State, put an end to the interstate character of the transaction and transform it into one purely intrastate? We think not. The intermediate delivery to the agency did not end and was not intended to end the movement of the commodity. It was merely halted as a convenient step in the process of getting it to its final destination. The general rule is that where transportation has acquired an interstate character 'it continues at least until the load reaches the point where the parties originally intended that the movement should finally end.' *Illinois Central R. R. Co. v. Louisiana R. R. Comm.*, 236 U. S. 157, 163."

See also *Illinois Central Railroad vs. Louisiana Railroad Commission*, 236 U. S. 157, 163 (1915), where this Court said:

> "When freight actually starts in the course of transportation from one State to another it becomes a part of interstate commerce. The essential nature of the movement and not the form of the bill of lading determines the character of the commerce involved. And generally when this interstate character has been acquired it continues at least until the load reaches the point where the parties originally intended that the movement should finally end."

See also *Western Union Telegraph Company vs. Foster*, 247 U. S. 105, 113 (1918), and *Western Oil Refining Company vs. Lipscomb*, 244 U. S. 346, 349 (1916).

It thus appears from these cases that the interstate character of the shipment of the lithographs in question continued until these advertisements had been displayed upon the billboards in the State of Utah. With such interstate shipment the State of Utah could not by such unreasonable legislation interfere without such legislation being obnoxious to Article I, Section 8 of the Constitution of the United States.

CONCLUSION.

In accordance with the foregoing, it is respectfully submitted that the decision of the Supreme Court of Utah should be reversed, and the case remanded with directions that the appellant be discharged.

Respectfully submitted,

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Cleveland, Ohio,
December 19, 1931.

APPENDIX A.

The following is the complete text of Chapter 145, Laws of Utah 1921, as amended by Chapter 52, Laws of Utah 1923, as amended by Chapter 68, Laws of Utah, 1925, as amended by Chapter 92, Laws of Utah 1929, as amended by Chapter 5, Laws of Utah 1930:

Section 1. *Unlawful to sell without license—State treasurer to grant—time limit—to whom may be granted—license to show—power to revoke—who must comply—fees and conditions—stamps—unlawful when—penalty.* It shall be unlawful for any person to barter, sell or offer for sale, cigarettes or cigarette papers in this State, without first having obtained a license therefor, which said license may be granted and issued by the State treasurer and shall be in force and effect for one year from and after the date of issuance, unless sooner revoked. It shall be granted only to a person owning or operating the place from which such sales are to be made, which shall be within the territorial limits of the State of Utah. Each license shall be numbered and shall show the residence and place of business of the licensee, and shall not be transferable. The State treasurer shall, on reasonable notice and after hearing, revoke the license of any person violating any provision of this Act, and no license can be issued to such person within a period of two years thereafter. Wholesalers, jobbers and distributors selling direct to consumers must comply with the provisions of this Act.

(a) No license shall be issued until the applicant shall have paid to the State treasurer an annual license fee of $10.00 per year or fraction thereof. All such license fees shall be credited to the general fund of the State.

(b) No license shall be issued until the applicant therefor shall have filed with the State treasurer a bond, to be approved by him, payable to the State of Utah for the benefit of all parties interested, in the amount of $500.00, and conditional upon the faithful observance of all the provisions of this Act, and for the payment of all damages that may result from the unlawful sale of ciga-

rettes or cigarette papers. Said bond shall be executed by a surety company authorized to do business in this State.

(c) There is hereby imposed, and there shall be collected by and paid to the State treasurer, upon the sale of all cigarettes and cigarette papers, or wrappers and tubes sold in this State to consumers, the following taxes:

Class A. On cigarettes weighing not more than three pounds per thousand, one mill on each such cigarette;

Class B. On cigarettes weighing more than three pounds per thousand, two mills on each such cigarette.

Class C. On cigarette papers or wrappers *on* [sic] any papers made or prepared for the purpose of making cigarettes, made up in packages, books or sets; on each such package, book or set containing not more than fifty papers, one-half cent; containing more than fifty papers but not more than one hundred papers, one cent; containing more than one hundred papers, one-half cent for each fifty papers or fractional part thereof.

Class D. On tubes, one cent for each fifty paper tubes or fractional part thereof.

(d) All cigarettes sold in this State under the provisions of this Act shall be put in packages containing 5, 8, 10, 12, 15, 16, 20, 24, 40, 50, 80 or 100 cigarettes each, and whenever a carton of cigarettes or a box containing packages of cigarette papers is broken open, such carton of cigarettes or packages of cigarette papers shall be construed to be open stock, and all open stock of cigarettes or cigarette papers and each package, book or set of papers or of tubes shall have securely affixed thereto a suitable stamp denoting the tax thereon. Said stamp shall be properly cancelled under such regulations as the State treasurer shall prescribe, and it shall be unlawful for any dealer to fail to affix to each package of cigarettes or cigarette papers the stamps denoting the tax thereon as herein provided, or to have in his possession any open stock of cigarettes or cigarette papers without having affixed thereto revenue stamps as herein provided.

When a full carton of cigarettes or a box of cigarette papers is sold the seal must be broken open and the re-

quired amount of revenue stamps affixed to each separate package of cigarettes or cigarette papers therein.

(e) Every dealer in cigarettes or cigarette papers shall keep all surplus and open stock of cigarettes and cigarette papers in such form as may be prescribed by the State treasurer, and shall keep a record of all his purchases of cigarettes and cigarette papers. Such records shall include invoices or bills of all such purchases and shall at all times during business hours be subject to inspection by the State treasurer or by any person duly authorized by him.

(f) Any person violating any provision of this Act other than sub-sections g and k shall be guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than $100.00 nor more than $299.00 or by imprisonment not exceeding six months, or by both such fine and imprisonment. All fines collected to be credited 50 per cent to the general fund of the city, town or county collecting the same; and 50 per cent to be remitted to the State treasurer. Reports shall be made to the State treasurer of all fines so collected, on the last day of such month.

(g) It shall be unlawful for any person with the intent to defraud the State to make, alter, forge or counterfeit any license or stamp provided for in this Act or to have in possession any forged, counterfeited, spurious or altered license or stamp, knowing the same to be forged, counterfeited, spurious or altered, and whoever is found guilty of any violation of this sub-section shall be fined not more than $1,000 or be imprisoned in the State prison not more than three years or by both such fine and imprisonment.

(h) The State auditor shall prepare and have suitable stamps for use on each kind of package described herein. Upon requisition from the State treasurer the State auditor shall deliver to his order the stamps designated in such requisition and shall charge the State treasurer with the stamps thus delivered, and shall keep an accurate record of all stamps coming into and leaving his hands. The State treasurer shall sell the stamps herein provided for only to dealers holding licenses issued as provided in this Act and the moneys received from the sale

of such stamps shall be turned into the general fund of the State. The State treasurer shall redeem and make repayment for any unused stamps on written request made by such dealer and pay for same out of any funds derived from the provisions of this Act. It shall be unlawful for a dealer to sell or dispose of such stamps to another dealer or to any person whomsoever, except whenever a person owns or operates more than one place of sale stamps may be distributed to the various places of sale by the main office, but each place of sale must have a separate license and cancellation stamp, and passenger trains operating within this State may stock their dining or buffet cars with cigarettes that have been stamped and cancelled with the cancellation number at division headquarters.

(i) The State treasurer in the enforcement of this Act may call to his aid the attorney-general, any county or district attorney or any peace officer. He is authorized to employ such clerks and additional help as may be needed to carry out the provisions of this Act.

(j) Licenses in force at the time this Act takes effect shall continue in force until they expire by their terms or are lawfully revoked.

(k) Any person who shall furnish to any minor by gift, sale or otherwise any cigarette or cigarette paper or wrapper, or any paper made or prepared for the purpose of making cigarettes, or any tobacco of any kind whatsoever shall be guilty of a misdemeanor, and shall be punished by fine of not less than $25 nor more than $299 or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

(l) Any person maintaining a place where cigarettes or cigarette papers or tobacco are sold or kept with intent to sell in violation of the provisions of this Act shall be deemed guilty of keeping and maintaining a nuisance, and the building or place so used for the sale or keeping for sale of cigarettes or cigarette papers or wrappers, or tobacco in violation of the provisions of this Act shall be deemed to be a nuisance, and such persons may be enjoined from maintaining such nuisance and such building or place may be abated as a nuisance, the procedure for

actions to enjoin and abate such nuisance, or for contempt in violating an order of injunction, shall be so far as applicable the same as that now provided by the laws of this State for enjoining and abating intoxicating liquor nuisances.

Section 2. *Unlawful to Display Advertising—Where.* It shall be a misdemeanor for any person, company, or corporation, to display on any bill board, street car sign, street car, placard, or on any other object or place of display, any advertisement of cigarettes, cigarette papers, cigars, chewing tobacco, or smoking tobacco, or any disguise or substitute of either, except that a dealer in cigarettes, cigarette papers, tobacco, or cigars or their substitutes, may have a sign on the front of his place of business stating that he is a dealer in such articles, provided that nothing herein shall be construed to prohibit the advertising of cigarettes, cigarette papers, chewing tobacco, smoking tobacco, or any disguise or substitute of either in any newspaper, magazine or periodical printed or circulating in the State of Utah.

Section 3. *Use of Tobacco, etc., by Minors Unlawful.* It shall be a misdemeanor for the proprietor of any place of business to knowingly permit minors under twenty-one years of age to frequent such place of business while in the act of using tobacco in any form. The term "place of business" as here used shall apply to any and all such places as shops, stores, factories, public garages, offices, theaters, recreation and dance halls, pool room, cafes, cafeterias, cabarets, restaurants, hotels, lodging houses, street cars, inter-urban and railway passenger coaches and waiting rooms.

Section 4. *Smoking Tobacco, etc., in Enclosed Place, Except in Smoking Rooms Forbidden—Smoking Signs.* It shall be a misdemeanor for any person to smoke cigars, cigarettes or tobacco in any form in any enclosed public place within the State of Utah, except in extra rooms, compartments or coaches specially provided for smoking purposes. The term "enclosed public place" as here used shall be construed to mean the dining rooms in hotels, restaurants, cafes and cafeterias; theaters, passenger ele-

vators, street cars, inter-urban and railway passenger coaches, motor and other passenger vehicles employed as common carriers, railway station waiting rooms, state, county and city buildings, excepting that the owner or proprietor of any hotel dining room, restaurant, cafe or cafeteria may designate the same as a public smoking room by a conspicuous sign at or near the entrance; provided, further, that in any State, county or city building, any public officer who has a private office separate and apart from his public office, may if he so desires, designate such private office as a place where smoking may be permitted, and so long as such private office is so designated smoking therein shall not be considered in violation of this Act.

Section 5. *"Unconstitutional" Reservation.* If any section, sub-section, clause, phrase or word of this Act is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this Act.

Section 6. This Act shall take effect and be in force ninety days from the date of its passage.